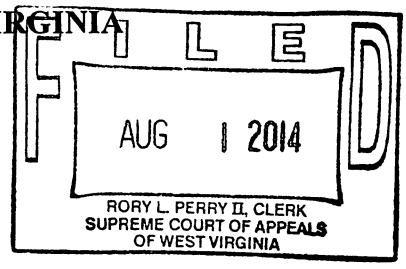
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0614



STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,

vs.

MITCHELL COLES, Defendant Below,
Petitioner.

PETITIONER'S REPLY BRIEF

FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
Criminal Case Numbers 99-F-28 & 99-F-175

Submitted by:
MITCHELL COLES, Petitioner,
By Counsel of Record:

W. Jesse Forbes, Esquire (WVSB ID# 9956)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Phone: 304-343-4050; Fax: 304-343-7450
E-mail: wjforbes@forbeslawwv.com
Counsel of Record for Petitioner, Mitchell Coles

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PETITIONER'S REPLY BRIEF

Now, comes the Petitioner, MITCHELL COLES, by counsel of record, W. Jesse Forbes, Forbes Law Offices, PLLC, and pursuant to the Scheduling Order of this Honorable Court, and the W.Va. Rules of Appellate Procedure hereby timely files this reply to the respondent's brief in the above-styled matter.

III. ASSIGNMENT OF ERROR

1. **The trial court erred in denying petitioner's motion to correct sentence in case number 99-F-28, as the conviction and sentencing for Count Two, "obtaining money by false pretenses" and Count Five, "fraudulent scheme", subjected him to double jeopardy of multiple convictions and multiple punishments for the same conduct.** Therefore, pursuant to the authority of ***State v. Rogers,*** 209 W.Va. 348, 547 S.E.2d 910 (W.Va. 2001), one of the convictions and sentences should be vacated upon this appeal.

IV. STATEMENT OF THE CASE

Petitioner submits that he adequately presented the "statement of the case" in the "Brief of Petitioner" and "Amended Brief of Petitioner," and therefore, the same are not reiterated upon this reply brief, but are referenced as if the same were fully set forth herein. However, Petitioner

takes issue with the respondent's statement of the case in several respects, as further outlined herein.

Indictment No. 99-F-28, did not charge the Petitioner with any offenses against "various businesses," it charged Petitioner with offenses against a single named victim, that victim being One Valley Bank. (AR 1-2). Respondent's assertion that any other businesses were included as victims in the offense of Fraudulent Scheme as charged in Count Five of Indictment No. 99-F-28 is without merit, as an examination of the face of the indictment clearly shows that no other victim, other than One Valley Bank, was named in the entire indictment. ***Id.*** Thus, the four corners of the indictment clearly indicate that Count Two for obtaining money by false pretenses and Count Five fraudulent scheme, are based upon the same conduct of Petitioner against the same victim, One Valley Bank, and therefore, both convictions and sentences cannot stand under double jeopardy proscriptions as the same constitute multiple punishments for the same offense. (AR pp. 1-2). Moreover, the Respondent's arguments ignore the fact that the State obtained substantial benefit from the plea agreement, as Petitioner waived his right to be charged by indictment, by agreeing to plead guilty to Prosecutor's Information No. 99-F-175, which charged Petitioner with offenses against multiple victims, whom respondent now improperly tries to commingle into Indictment No. 99-F-28. This Honorable Court should not be swayed by the respondent's misleading and unfounded arguments and misstatements of the case with respect to the face of Indictment No. 99-F-28 and other evidence of record.

V. SUMMARY OF ARGUMENT

In ***State v. Rogers, supra,*** this Honorable Court held that:

> Based on the foregoing statutory comparison, we hold that every element necessary for a larceny conviction under West Virginia Code § 61-3-24 (false pretenses) is also an element for a larceny conviction under West Virginia Code § 61-3-24d (fraudulent scheme). Consequently, Appellant's convictions and related

sentences under both statutes with regard to the money obtained from Elkins cannot stand based on double jeopardy proscriptions. 547 S.E. 2d at 921.

Likewise, herein, Count Two, false pretenses, and Count Five, fraudulent scheme as contained in Felony Indictment 99-F-28, constituted multiple convictions and multiple punishments for the same conduct against the same victim One Valley Bank. Therefore, pursuant to the authority of ***State v. Rogers***, ***supra,*** cited above, the convictions and sentence have violated Petitioner's constitutional right to be protected from double jeopardy; therefore, one of such convictions and sentence must be vacated.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By prior Order of this Honorable Court this matter has been scheduled for oral argument under Rule 20 of the Rules of Appellate Procedure, said argument is set for September 3, 2014. Petitioner submits that pursuant to Rule 10(e) respondent may have waived its right to present oral argument by its prior submission of a summary response in this matter; however, Petitioner recognizes that this Honorable Court has the authority and discretion to allow respondent to participate in oral argument, and Petitioner believes oral argument will assist the Court in its decision on the merits of this appeal.

VII. ARGUMENT

A. Reply to Introduction

The Respondent's introduction and indeed, entire brief, ignores the controlling precedent of this Court in ***State v. Rogers,*** 209 W.Va. 348, 547 S.E.2d 910 (W.Va. 2001), which is directly on point with the facts and circumstances of Petitioner's case and clearly applicable herein. Respondent further makes arguments which are misleading and lack merit. Respondent's entire introduction completely ignores the existence of the separate and distinct charging instrument of **Prosecutor's Information No. 99-F-175**, which charged offenses which occurred between

November of 1998 and January of 1999, against multiple businesses, under which the Petitioner was subject to the imposition of separate sentences for those offenses. (AR pp. 3-4, AR pp.7-9). Moreover, upon appearance of new counsel for respondent, respondent has now asserted that Count Five (5) of Indictment No. 99-F-28, somehow relates to a victim other than One Valley Bank, whereas in Respondent's "Summary Response" filed with this Court on September 26, 2013, Respondent's counsel therein acknowledged that Count 5 (Five) of Indictment 99-F-28, was an "aggregate count." (See: Summary Response, p. 2, paragraph 2). Petitioner submits that under the normally recognized definition of the word aggregate, respondent has already admitted that Count Five constituted a combination of the prior counts in that single indictment, Indictment No. 99-F-28, which only named one sole victim, to-wit: One Valley Bank, but then respondent continues to argue to the contrary. (AR 1-2). Had the State intended Count Five of said **Indictment no. 99-F-28,** to relate to any other victim, said indictment should have named another victim(s) on its face, but it does not. ***Id.*** Thus, Respondent continues to attempt to comingle the offenses in two separate and distinct charging instruments, and ignores that the trial court imposed separate sentences for the offenses and various victims of Prosecutor's Information 99-F-175. (AR pp. 1-2, and AR pp. 3-4, and AR pp. 7-9).

Respondent further misconstrues Petitioner's assignment(s) of error that his convictions and sentences on Count Two and Count Five of **Indictment Number 99-F-28** constitute multiple punishments for the same offense in violation of the constitutional prohibition against double jeopardy. Respondent continues to commingle the separate charging instruments of **Indictment No. 99-F-28** and **Prosecutor's Information No. 99-F-175**, in a vain attempt to escape the controlling precedent set forth by this Honorable Court in ***State v. Rogers, supra.*** Respondent further misconstrues and/or completely misstates Petitioner's arguments regarding

the plea agreement, and further fails to recognize and acknowledge that two separate charging instruments exist, and that from the face of the Indictment 99-F-25, it only names one single victim, to-wit: One Valley Bank, while the separate charging instrument of Information No.99-F-175, dealt with the other various victims of Petitioner's crimes. (AR pp. 1-2, AR pp. 3-4).

Not once, in respondent's entire introduction, does the respondent mention the second charging instrument, Prosecutor's Information No. 99-F-175, which was part of the plea agreement and which set forth the charges against the other multiple victims. Thus, Respondent is once again trying to circumvent the two separate charging instruments and combine them into one, therefore, respondent's arguments are unfounded, misleading, and without merit. Petitioner's conviction and sentence imposed in **Indictment No. 99-F-28** for Count Two, "obtaining money by false pretenses" and Count Five, "fraudulent scheme", subjected Petitioner to double jeopardy of multiple convictions and multiple punishments for the same conduct against One Valley Bank, and therefore, pursuant to the authority of ***State v. Rogers, supra,*** one of the convictions and sentences should be vacated upon this appeal.

Additionally, Respondent's motion to supplement the appendix was unwarranted and improper under Rule 7(g), as the motion failed to show good cause as to why the material was not previously included. Petitioner had previously conferred in good faith with the Respondent on the appendix record, and Respondent did not request that the records now contained in its supplemental appendix to be included. Regardless, the supplemental appendix fails to lend any credence to Respondent's arguments as the multiple victims named therein were the subject of the Prosecutor's Information No. 99-F-175, and/or were otherwise victims of uncharged offenses, to whom Petitioner agreed to pay restitution. (AR pp. 3-4, and AR 5-6). The existence of these multiple victims, for which Petitioner was prosecuted under separate Information No.

99-F-175, does not change the fact that Indictment No. 99-F-28, on its face, only names one sole victim, to-wit: One Valley Bank, therefore, Petitioner's conviction and sentence for obtaining money by False Pretenses under Count Two and Fraudulent Scheme under Count Five, constitute multiple punishments for the same offense against the same victim in violation of Double Jeopardy provisions of the Constitutions of the United States and West Virginia. ***United States v. Broce,*** 488 U.S. 563, 569, cited by respondent, is distinguishable from Petitioner's case, and moreover, the United States Supreme Court therein recognized that there were exceptions to the general rule, wherein it stated that "[t]here are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence." ***Id.*** The ***Broce*** Court also discussed the exceptions to the general rule, as follows:

> "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." 423 U.S., at 62, 96 S.Ct. at 242. We added, however, an important qualification:
>
> "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one which the State may not constitutionally prosecute." *Id.*, at 63, n. 2, 96 S.Ct., at 242, n. 2 (emphasis added). ***U.S. v. Broce,*** 488 U.S. at 575 ***citing*** *Menna v. New York,* 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) *(per curiam),* and *Blackledge v. Perry,* 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).

Herein, on the face of the indictment at issue on this appeal, Indictment No. 99-F-28, there is only one named victim, that victim being One Valley Bank, therefore respondent's arguments that any other victim(s) were supposedly included in Count Five, of Indictment 99-F-28, are disingenuous at best and otherwise without merit. If the State had intended Indictment No. 99-F-28, to apply to any other victim besides One Valley Bank, then evidence regarding such other victims should have been presented to the grand jury and named on the face of the indictment in order to adequately and sufficiently provide notice to Petitioner of the charges he was facing, but no such other victim was named therein. (AR 1-2). The

indictment in this matter is insufficient to support the respondent's arguments that any offenses were charged therein against any other victim, besides One Valley Bank, as One Valley Bank was the only named victim on the face of Indictment No. 99-F-28.

> "' "An indictment is sufficient under Article III, § 14 of the West Virginia Constitution and W.Va. R.Crim. P. 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy." Syl. Pt. 6, *State v. Wallace,* 205 W.Va. 155, 517 S.E.2d 20 (1999).' Syl. Pt. 5, *State v. Haines,* 221 W.Va. 235, 654 S.E.2d 359 (2007)." Syl. Pt. 4, *Ballard v. Dilworth,* 230 W.Va. 449, 739 S.E.2d 643 (2013).
>
> Further, respondent's arguments fail to take into account this Honorable Court's prior holdings, when appraising the sufficiency of indictment, which hold that:
>
> Assessment of the facial sufficiency of an indictment is limited to its "four corners," and, because supplemental pleadings cannot cure an otherwise invalid indictment, courts are precluded from considering evidence from sources beyond the charging instrument. Consequently, we afford no deference to a lower court's determinations regarding the sufficiency of an indictment. *See* Syl. pt. 2, in part, *State v. Miller,* 197 W.Va. 588, 476 S.E.2d 535 (1996) ("Generally, the sufficiency of an indictment is reviewed *de novo.*").

Petitioner's appeal is grounded in the double jeopardy violation of Indictment No. 99-F-28; however, the above-cited authority is instructive to counter respondent's spurious claims that the Fraudulent Scheme offense contained in Count Five of said indictment somehow relates to any other victim besides One Valley Bank. The obtaining by false pretenses as charged in Count Two and Fraudulent Scheme in Count Five constitute the same offense and Petitioner was punished twice for the same conduct against the same victim, One Valley Bank, in violation of the proscription against double jeopardy. The above-cited authority clearly indicates that respondent's arguments with respect to Count Five of Indictment 99-F-28 are completely without merit under the analysis set forth above. No reasonable construction or rational reading of the four corners of Indictment No. 99-F-28 can support the respondent's unfounded arguments that said indictment applies to any other victim besides One Valley Bank.

Therefore, pursuant to the holding of this Honorable Court in ***State v. Rogers, supra,*** as well as the pronouncements of the United States Supreme Court cited above, the Respondent herein had no constitutional right to prosecute nor convict and sentence the Petitioner to both Count Two, obtaining by false pretenses, and Count Five fraudulent scheme, as such convictions and sentences constituted multiple punishments for the same offense against One Valley Bank in violation of Petitioner's constitutional rights against Double Jeopardy. In ***State v. Rogers, supra,*** this Court analyzed the legislative intent and the elements of proof required for false pretenses and fraudulent scheme under the respective statutes, and held that:

> Based on the foregoing statutory comparison, we hold that every element necessary for a larceny conviction under West Virginia Code § 61-3-24 (false pretenses) is also an element for a larceny conviction under West Virginia Code § 61-3-24d (fraudulent scheme). Consequently, Appellant's convictions and related sentences under both statutes with regard to the money obtained from Elkins cannot stand based on **double jeopardy proscriptions.**

Therefore, the authority and precedent of ***State v. Rogers, supra,*** should control the Court's decision upon this appeal, and one of the convictions and sentences against Petitioner in Indictment No. 99-F-28, should be vacated herein.

I. RESPONDENT'S ARGUMENT THAT HE WAIVED HIS CONSTITUTIONAL RIGHTS AGAINST DOUBLE JEOPARDY BECAUSE OF HIS GUILTY PLEA IS WITHOUT MERIT.

Petitioner's double jeopardy claims were not and cannot be waived by the guilty plea in the instant case; the double jeopardy claim of Petitioner has merit, was properly raised in the lower court, and was erroneously denied by the lower court. The U.S. Supreme Court carved out an exception in ***United States v. Broce***, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed. 2d 927 (1989) called the "face of the indictment" exception. Under ***Broce, supra,*** if deciding a double jeopardy claim requires going beyond the existing record and holding a separate evidentiary

hearing, a defendant's guilty plea bars any antecedent constitutional violations. Going beyond the face of the indictment is what respondent herein is attempting to do with its unfounded theories, not the Petitioner. The justification for the ***Broce*** rule is that such a double jeopardy claim cannot be proven without contradicting the existing record "and that opportunity is foreclosed by the admissions inherent in the guilty plea." Such is not the case herein, and in fact the narrow face of Indictment No. 99-F-28, clearly shows that Petitioner was subjected to Double Jeopardy as he was punished twice for the same offense against the same victim, One Valley Bank.

In explaining its departure from ***Blackledge, supra,*** and ***Menna, supra,*** the Supreme Court made the following distinguishing analysis:

> Both Blackledge and Menna could be (and ultimately were) resolved without any need to venture beyond the record as it existed at the plea proceedings. In Blackledge, the concessions implicit in the defendant's guilty plea were simply irrelevant, because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all. In Menna, the indictment was facially duplicate of the earlier offense of which the defendant had been convicted and sentenced so that the admissions made by Menna's guilty plea could not conceivably be construed to extend beyond a redundant confession to the earlier offense. 488 U.S. at 575-576, 109 S.Ct. at 765-766, 102 L.Ed.2d at 940.

Of course the issue herein, is not whether the Petitioner is guilty of the crime charged in Indictment 99-F-28, but whether he had already been punished or punished twice for it, under Counts Two and Count Five, and Petitioner's double jeopardy claim can be found meritorious on the existing record and face of the indictment herein (A.R. p. 1-2).

This Honorable Court stated in ***State v. Greene,*** 196 W.Va. 500, 473 S.E.2d (1996) as follows:

> ***Broce*** is inapposite and its holding in no way limits the opportunity for a criminal defendant to challenge the imposition of double jeopardy. If ***Broce*** means anything, it means that claims litigated below that are inconsistent with an

admission of guilt are waived by a guilty plea. Clearly, the admission of guilt in no way impacted the issue of double jeopardy.

Therefore, the order of the Circuit Court of Monongalia County which denied Petitioner's motion for correction of sentence, must be reversed, as the final order misstated and/or misconstrued the plain language of the indictment 99-F-28, confused and/or commingled the facts and terms of the plea agreement with respect to the victims of record in two separate charging instruments, and ignored the applicable authority of this Honorable Court. The lower court's order further ignored the Constitutional principles against Double Jeopardy, as Count Two and Count Five of the indictment in 99-F-28 constituted multiple charges and multiple punishments for the same conduct against the same victim, to wit: One Valley Bank. A meaningful review of the face of the indictment in Case Number 99-F-28, will clearly reveal that the only victim is, in fact, One Valley Bank and all the allegations in Count Two (obtaining money by false pretenses) are based on the same conduct against the same victim as Count Five (fraudulent scheme).

II. PETITIONER CLEARLY SATISFIES THE NARROW FACE OF THE INDICTMENT EXCEPTION UNDER BROCE. RESPONDENT'S ARGUMENTS CANNOT SURVIVE A RATIONAL READING OR REASONABLE CONSTRUCTION OF THE FOUR CORNERS OF THE INDICTMENT, AS THE FACE OF THE INDICTMENT ITSELF DOES NOT SUPPORT RESPONDENT'S ARGUMENTS.

Respondent's arguments essentially constitute an attempt to amend Indictment No. 99-F-28 upon this appeal to include victims, whom were not named therein, and against whom Petitioner was never charged under said indictment, despite his plea agreement to pay restitution to these other uncharged victims. (AR pp. 1-2, AR pp. 3-4, AR, pp. 5-6).

> **...An indictment may be amended by the circuit court, provided the amendment is not substantial, is sufficiently definite and certain, does not take the defendant by surprise, and any evidence the defendant had before the amendment is equally available after the amendment." Syl. Pt. 2, *State v. Adams,* 193 W.Va. 277, 456 S.E.2d 4 (1995).**
>
> **Any substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury. An 'amendment of form' which does not require resubmission of an indictment to the grand jury occurs when the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced." Syl. Pt. 3, *State v. Adams,* 193 W.Va. 277, 456 S.E.2d 4 (1995).**

Thus, Respondent's arguments are completely at odds with the West Virginia grand jury process of indictment, and further run afoul of the plea agreement as a result of respondent's attempt to change the meaning and substance of Indictment No. 99-F-28. This is not federal court, wherein relevant background conduct can be utilized to enhance criminal sentences based on uncharged conduct. Herein, in the State of West Virginia, under the Constitution and statutory laws governing grand juries and indictments, the State is limited to the face of the indictment for prosecution, conviction and sentencing of offenses.

> **"A defendant has a right under the Grand Jury Clause of Section 4 of Article III of the West Virginia Constitution to be tried only on felony offenses for which a grand jury has returned an indictment." Syl. Pt. 1, *State v. Adams,* 193 W.Va. 277, 456 S.E.2d 4 (W.Va. 1995).**

Therefore, on the face of Indictment No. 99-F-28, the obtaining by false pretenses charge of Count Two and the fraudulent scheme charge of Count Five, both relate to the same conduct of Petitioner against the same named victim, One Valley Bank. Further, Respondent ignores that the Court in ***State v. Rogers***, made a chart of the statutory language of both W.Va. Code § 61-3-24d, defining fraudulent scheme, and compared the same to the statutory language of W.Va. Code § 61-3-24, defining obtaining money by false pretenses, and stated as follows:

> As the chart illustrates, the larceny by fraudulent scheme statute requires that a person "deprive" another of property while the larceny by false pretense statute

> requires that the property be "obtained." According to the accepted meaning of the term deprive, we note that "to deprive" one of property is to "dispossess" another of that property. Under the particular facts of this case, we perceive no material or substantial difference in the terms "deprive" and "obtain." Further support for this conclusion is suggested by the fact that the word "obtained" is used interchangeably with "deprived" in subsection (c) of the larceny by fraudulent scheme statute.[29]
>
> Continuing the analysis, we note that the larceny by fraudulent scheme statute requires that the perpetrator act "by means of fraudulent pretenses, representations or promises," while the larceny by false pretense statute requires that the act be done by "any false pretense, token or representation." A comparison of these statutory elements demonstrates no substantive difference with regard to the method of deceit which may be employed to commit either crime under either definition being reviewed. ***State v. Rogers,*** 547 S.E.2d at 920-921 (W.Va. 2001). ***(footnotes omitted herein).***

Therefore, Count Two, obtaining money by false pretenses and Count Five fraudulent scheme constitute the same offense, and Petitioner's conviction and sentences on both counts was in violation of double jeopardy as Petitioner was punished twice for the same conduct by the trial court's refusal to correct his sentence. Under respondent's dubious theories, Count Five could relate to any one at all, and therefore, such arguments are without merit, as the same are inconsistent with the above-cited prior authority of this Court relating to the sufficiency of indictments. Indeed respondent's disingenuous arguments are completely inconsistent with any constitutional concept of notice and due process of law within any civilized system of justice. Petitioner's convictions and sentences to obtaining by false pretenses charged in Count Two and fraudulent scheme charged in Count Five of Indictment No. 99-F-28, clearly related to the same offense against One Valley Bank, therefore, Petitioner was subjected to multiple punishments for the same offense in violation of his constitutional rights against Double Jeopardy, and one of those convictions and sentences must be vacated upon this appeal pursuant to the controlling precedent of ***State v. Rogers, supra*** .

VIII. CONCLUSION

WHEREFORE, for all the foregoing reasons, and pursuant to the authorities cited herein, the Petitioner, Mitchell Coles, prays that this Honorable Court will reverse the final order of the Circuit Court of Monongalia County denying the Petitioner's Motion for Correction of Sentence, and remand this matter with instructions to the lower tribunal to vacate the conviction and sentence in Count Two or Count Five of Indictment 99-F-28, accordingly. Petitioner prays for all such further relief as the Court deems fair, just and appropriate.

Respectfully submitted,
MITCHELL COLES, Petitioner,
By Counsel of Record:

W. Jesse Forbes, Esquire (WVSB ID# 9956)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Phone: 304-343-4050; Fax: 304-343-7450
E-mail: wjforbes@forbeslawwv.com
Counsel of Record for Petitioner, Mitchell Coles

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CERTIFICATE OF SERVICE

I, W. Jesse Forbes, counsel of record for Petitioner, MITCHELL COLES, hereby certify that a true and exact copy of the foregoing ***"Petitioner's Reply Brief"*** was duly served upon counsel of record for the Respondent, State of West Virginia, by depositing the same in the first-class, U.S. mail, postage pre-paid, on this the 1ST day of August, 2014, addressed as follows:

Misha Tseytlin, Deputy Attorney General
Office of the Attorney General
State Capitol Bldg. 1, Room E-26
Charleston, WV 25305

Laura Young, Assistant Attorney General
Office of the Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301

W. Jesse Forbes, Esquire (WVSB ID# 9956)
FORBES LAW OFFICES, PLLC
1118 Kanawha Boulevard, East
Charleston, WV 25301
Phone: 304-343-4050; Fax: 304-343-7450
E-mail: wjforbes@forbeslawwv.com
Counsel of Record for Petitioner, Mitchell Coles